(1)

88-444

No. .....

Supreme Court, U.S.
FILED
SEP 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

—o—

ROBERT W. LOTT,

Petitioner,

v.

FIREMEN AND POLICEMEN'S PENSION FUND BOARD OF TRUSTEES OF SAN ANTONIO, TEXAS,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

—o—

MAYO J. GALINDO
7718 Broadway
San Antonio, Texas 78209
(512) 828-6777
State Bar No. 07580000

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

This case presents the following questions for review:

1. Whether a petition which presents a claim under state law but also asserts that federal law deprives a defendant of a defense he may assert creates exclusive federal jurisdiction.

2. Whether a veteran's claim under state statute expressly authorized by the Congress must nevertheless be exclusively tried in the federal courts because of the enforcement provisions to the Federal Veterans' Acts.

3. Whether the respondent's failure to timely file a petition for removal within thirty days after service of process waived its claims to federal jurisdiction.

PARTIES

Petitioner ROBERT W. LOTT, a sergeant in the San Antonio Police Department

Respondent, FIREMEN AND POLICEMENS' PENSION FUND BOARD OF TRUSTEES OF SAN ANTONIO, TEXAS whose individual members are:

HENRY G. CISNEROS

WEIR LABATT III

JAMES C. HASSLOCHER

CARLOS RESENDEZ

LARRY A. REED

AL PEELER

JAMES WILLBORN

B. C. MEDLOCK

DAVE W. ALSBURY

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	5
A. THE CONGRESS HAS AUTHORIZED STATES TO LEGISLATE VETERANS' BENEFITS AND PETITIONER SHOULD BE ALLOWED TO VINDICATE SUCH RIGHTS IN THE STATE COURTS	5
B. THE COURTS BELOW MISCONSTRUED PETITIONER'S SUIT AS ONE TO ENFORCE FEDERAL VETERANS' ACTS	6
C. THE WELL PLEADED COMPLAINT DETERMINES WHETHER PLAINTIFF'S PETITION PRESENTS A SUIT ARISING UNDER FEDERAL LAW	6
D. THE TEXAS STATUTE GRANTS VETERANS' BENEFITS CONGRUENT WITH THE FEDERAL STATUTES TO THOSE WHO "ENTER THE MILITARY SERVICE"	8
E. ONLY FIELD PREEMPTION MANDATES EXCLUSIVE FEDERAL JURISDICTION	10
CONCLUSION	11
APPENDIX 1	
Letter by Petitioner to Respondent Board	1A

TABLE OF CONTENTS—Continued

Page

APPENDIX 2
The Board's Reply to Petitioner 2A

APPENDIX 3
Petitioner's First Amended Original Petition..... 3A

APPENDIX 4
Defendant's First Amended Original Answer 10A

APPENDIX 5
Judgment 16A

APPENDIX 6
Opinion of Fourth Court of Appeals 20A

APPENDIX 7
Order Denying Petitioner's Application for Writ of Error 27A

APPENDIX 8
Order Denying Petitioner's Motion for Rehearing 28A

APPENDIX 9
Section 7c, Article 6243f, Vernon's Annotated Texas Civil Statutes 29A

APPENDIX 10
Article 6252-4a, Vernon's Annotated Texas Civil Statutes, Acts 52nd Leg. 168, Ch. 106 as amended by Act 60th Leg. 1074, Ch. 469 ..... 30A

APPENDIX 11
Texas Civil Practice and Remedies Code, Section 37.009 ..... 34A

APPENDIX 12
Texas Civil Practice and Remedies Code, Secction 38.001 ..... 35A

APPENDIX 13
United States Code, Title 38, Section 2021(3)(c)..... 36A

TABLE OF CONTENTS—Continued

Page

APPENDIX 14
United States Code, Title 38, Section 2022 ..... 37A

APPENDIX 15
United States Code, Title 28, Section 1446(b) 39A

APPENDIX 16
Opinion, MW-109, Attorney General of Texas, December 20, 1979 ..... 40A

APPENDIX 17
Local Government Code, Title 5, Section 143.072..... 45A

TABLE OF AUTHORITIES

Page

CASES

Alabama Power Company v. Davis, 431 U.S. 581 (1977) 10

Belknap v. Hale, 463 U.S. 491 (1983) 10

California Federal Savings and Loan Association v. Guerra, 479 U.S. 272 (1987) 10

Caterpillar, Inc. v. Williams, 482 U.S. —, 96 L.Ed. 2d 318 (1987) 7

Christianson v. Colt Industries, 100 L.Ed.2d 811 (1988) 7

Claflin v. Houseman, 93 U.S. 130 (1878) 8

Davila v. Corpus Christi National Bank, 750 S.W. 2d 1 (Tex. App.—Corpus Christi 1986, error ref. n.r.e.) 7

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983) 7, 10

Gully v. First National Bank in Meridian, 299 U.S. 109 (1936) 7

International Longshoreman's Association v. Davis, 476 U.S. 380 (1986) 10

Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908) 7

Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986) 7

Mondou v. New York, N.H.&H.R. Co., 223 U.S. 1 (1911) 8

Peel v. Florida Department of Transportation, 600 F.2d 1070, 1074 (5 Cir. 1979) 8

Taylor v. Anderson, 234 U.S. 74 (1914) 7

TABLE OF AUTHORITIES—Continued

Page

Tennessee v. Union and Planters Bank, 152 U.S. 454 (1894) 7

Testa v. Katt, 330 U.S. 386 (1947) 8

FEDERAL STATUTES

United States Code

28 U.S.C. 1257(3) 2

28 U.S.C. 2022 ..... 3, 5

38 U.S.C. 1446(b) 3, 6

38 U.S.C. 2021(3)(c) 3, 4, 6, 8, 10

STATE STATUTES

Vernon's Annotated Texas Civil Statutes

Section 7c
Article 6243f 2, 3, 4

Section 3
Article 6252-4a 2, 4, 6, 10

Texas Civil Practice and Remedies Code
Sections 37.009 and 38.001 ..... 2, 11

OPINION

Opinion, MW-109, Attorney General of Texas, December 20, 1979 10

LAW REVIEWS

51 U. Chi. L. Rev. 634, 664, 665 10

No. .....

—o—

In The

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ROBERT W. LOTT,

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FIREMEN AND POLICEMEN'S PENSION FUND
BOARD OF TRUSTEES OF
SAN ANTONIO, TEXAS,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

—o—

ROBERT W. LOTT petitions for a Writ of Certiorari to review the judgment of the Texas Supreme Court in this case.

—o—

OPINIONS BELOW

The opinion of the San Antonio Court of Appeals (App. 6, 17a) is reported at 742 S.W.2d 730. The order of the Texas Supreme Court denying Petitioner's Application for Writ of Error (App. 7, 20a) and its order denying Petitioner's Motion for Rehearing (App. 8, 21a) are not reported.

———o———

JURISDICTION

Judgment of the San Antonio Court of Appeals was rendered October 28, 1987. Motion for Rehearing by that court was denied December 9, 1987. The Texas Supreme Court denied Petitioner's Application for Writ of Error May 25, 1988, and Petitioner's Motion for Rehearing to that court was also denied on June 29, 1988. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

———o———

STATUTORY PROVISIONS INVOLVED

1. Article 6252-4a, Vernon's Annotated Texas Civil Statutes, Acts 52nd Leg. 168, Ch. 106 as amended by Act 60th Leg. 1074, Ch. 469.
2. Section 7c, Article 6243f, Vernon's Annotated Texas Civil Statutes.
3. Texas Civil Practice and Remedies Code, Sections 37.009 and 38.001.

4. United States Code, Title 38, Section 2021(3)(c).

5. United States Code, Title 38, Section 2022.

6. United States Code, Title 28, Section 1446(b).

In view of their length all of these statutory references are set out in the Appendix to this brief.

———o———

STATEMENT

On August 10, 1982, the San Antonio Firemen's and Policemen's Civil Service Commission granted Petitioner leave to enter the United States Air Force for the period from August 10, 1982 through May 29, 1986. Petitioner was a reservist who volunteered for active duty. On May 30, 1986, Petitioner was honorably discharged from his duties as a captain in the United States Air Force and on July 12, 1986, he was reinstated in the San Antonio Police Department to his former rank of sergeant. Late in 1985 and before his release from active duty, Petitioner wrote the Pension Fund Trustees requesting advice as to the procedures and monies necessary to contribute to the Pension Fund for his time spent in the military. (App. 1, 1a) The Respondent through its counsel replied that he was ineligible to contribute to the Pension Fund because he volunteered for duty and was not "called to military service" as provided in Section 7c of Article 6243f, Vernon's Annotated Texas Civil Statutes. (App. 9, 22a).

Because of this fact Petitioner's suit for declaratory judgment anticipated that Respondent Board would assert this defense and affirmatively pleaded the superseding

provisions of 38 U.S.C. 2021 et seq. which grant pension benefits to veterans who enter the military service whether or not voluntarily and whether ordered or called to active duty.

On the day of trial Respondent for the first time filed its plea to the jurisdiction asserting that federal courts have exclusive jurisdiction of Petitioner's suit. This plea was overruled by the court and it proceeded to render judgment in Petitioner's favor which required the Respondent Board to accept the sum of Ten Thousand Six Hundred Fifty Eight and 08/100 Dollars ($10,658.08) as Petitioner's share of contributions to the fund while in the military. It further awarded him attorney's fees because his employment contract was breached. The court issued its declaratory judgment and construed the provisions of Section 7c of Article 6243f, infra, to mean that "called to active military service" includes also those military reservists who enter military duty for a period not to exceed four (4) years after August 1, 1961, whether or not voluntarily or whether ordered or called to active duty so as to harmonize the phrase in the state statute consistent with the federal acts rather than declare it invalid. In its legal conclusions the Court further found that Petitioner's suit had but tangential reference to federal law, and that Article 6252-4a, Vernon's Annotated Texas Statutes afforded Petitioner a separate, independent ground of recovery.

The San Antonio Court of Appeals reversed and dismissed Petitioner's suit for want of jurisdiction and the Texas Supreme Court denied Petitioner's application for writ of error and his subsequent motion for rehearing.

(App. 6, App. 7, and App. 8, 17a, 20a, and 21a, respectively).

The court reasoned that enforcement provisions found in 38 U.S.C. 2022 (App. 14, 28a) vested exclusive jurisdiction in the Federal District Court. The opinion totally disregards the nature of Petitioner's reference to federal law, namely that it was plead only to dispel the defense which was actually asserted by the Respondent that Petitioner's volunteering for active duty deprived him of the right to contribute to the fund.

———o———

REASONS FOR GRANTING THE PETITION

A. THE CONGRESS HAS AUTHORIZED STATES TO LEGISLATE VETERANS' BENEFITS AND THE PETITIONER SHOULD BE ALLOWED TO VINDICATE SUCH RIGHTS IN THE STATE COURTS

This case presents important questions concerning the right of Texas veterans to enforce substantive rights granted them under the Texas Veteran's Act which grant the same benefits as the Federal Statutes. The Congressional Acts authorize the states to legislate benefits to its veterans which may be consistent or greater than those granted by the Congress so long as they do not abridge or diminish federally created rights. Simply because the Petitioner incorporated federal law in his complaint to defeat the defense asserted by the Board should not mean that every veteran granted similar rights by the states must seek his redress in the federal courts. The Petitioner should be free to pursue his action in the state courts to

vindicate his statutorily granted rights under Texas law and relieve the already overburdened federal courts as the exclusive forum.

B. THE COURTS BELOW MISCONSTRUED PETITIONER'S SUIT AS ONE TO ENFORCE FEDERAL VETERANS' ACTS

The courts below misconstrued Petitioner's suit as one to enforce federal rights which are mandatory upon the states and their political subdivisions since December 3, 1974. It totally ignored the fact that Article 6252-4a of the Texas Civil Statutes is identical with the provisions of 38 U.S.C. 2021 et seq. While it is true that Petitioner could have filed this suit in the Federal Court under the Federal Acts with a pendent state claim, he chose not to do so. The courts also ignored the fact that Respondent failed to timely file a petition for removal to the local Federal District Court within thirty (30) days after having been served with process. Under these circumstances, the Respondents have waived their claims to defend in the federal courts. 28 U.S.C. 1446(b) (App. 15, 29a).

C. THE WELL PLEADED COMPLAINT DETERMINES WHETHER PLAINTIFF'S PETITION PRESENTS A SUIT ARISING UNDER FEDERAL LAW

The question of whether a claim "arises under" federal law must be determined by reference to the "well-pleaded" complaint. Since a defendant may not create federal jurisdiction by alleging federal law as a defense, it also follows that a federal suit that goes beyond the Plaintiff's cause of action in anticipation or reply to a probable defense does not vest federal court jurisdiction. This is exactly what was done in this case. Before his

release from active duty the Respondent Board notified Petitioner of his ineligibility to contribute to the fund because he volunteered for duty. Consequently when Petitioner filed suit he was already aware of the Respondent's defense to his cause of action and his reference to the federal law was only in anticipation or reply to the defense which was in fact asserted. The incorporation of the federal law under these circumstances did not create exclusive federal jurisdiction. *Gully v. First National Bank in Meridian,* 299 U.S. 109; *Louisville and Nashville R. Co. v. Mottley,* 211 U.S. 149; *Tennessee v. Union and Planters Bank,* 152 U.S. 454; *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California,* 463 U.S. 1 (1983); *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804; *Caterpillar Inc. v. Williams,* 483 U.S. —, 96 L.Ed.2d 318; *Christianson v. Colt Industries,* 100 L.Ed.2d 811.

We believe that decisions of this court in *Taylor v. Anderson,* 234 U.S. 74, 75-76, and *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, are dispositive. Each of these cases dealt with allegations in the Plaintiff's complaint that went well beyond what was required and which involved reference to federal law only to defeat the Defendant's position. A recent Texas case recognized this principle. *Davila v. Corpus Christi National Bank,* 750 S.W.2d 1 (Tex. App. - Corpus Christi 1986, error ref. n.r.e.).

> The well pleaded complaint rule dictates that a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case "arises under" federal law . . . It is insufficient for jurisdictional purposes that the plaintiff asserts that

> federal law deprives defendants of a possible defense ... *Davila* at page 2.

Since Petitioner's suit was founded upon Texas law it must be heard by the Texas courts and the latter cannot decline to entertain suit based on a federal statute where the state affords a similar remedy. *Mondou v. New York, N.H.&H.R. Co.,* 223 U.S. 1, 57; *Claflin v. Houseman,* 93 U.S. 130; *Testa v. Katt,* 330 U.S. 386, 394:

> Under these circumstances, the state courts are not free to refuse enforcement of petitioner's claim.

D. THE TEXAS STATUTE GRANTS VETERANS' BENEFITS CONGRUENT WITH THE FEDERAL STATUTES TO THOSE WHO "ENTER THE MILITARY SERVICE"

The Congress has authorized the states to legislate in this area.

> The rights granted by subsections (a) and (b) of this section to persons who left the employ of a state or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such state or political subdivision establishing greater or additional rights or protections. 38 U.S.C. 2021(3)(c) (App. 13, 27a).

This Congressional fiat was construed by the Fifth Circuit in *Peel v. Florida Department of Transportation,* 600 F.2d 1070, 1074 (5th Cir. 1979). The court held that states are free to establish additional rights and protections supplemental to those the Federal Act provides so long as they do not diminish or restrict the reemployment rights granted by the Congress.

The Texas Legislature responded by enacting Article 6252-4a (App. 10, 23a). Although Congress made the Federal Acts obligatory on the states December 3, 1974, the Texas Legislature had previously legislated and granted veterans' benefits to those who entered the military so long as they were honorably discharged and were not in the service for more than five (5) years.

Section 3 of the Act provides that veterans shall be deemed to have been on furlough and "shall be entitled to participation in retirement or other benefits to which employees of the State of Texas or any political subdivision, state institution, county or municipality thereof are, or may be entitled . . ." The 1967 amendment to the Act extended benefits to all veterans irrespective of how they entered the service. The caption of the amendment provides:

> An act providing for and regulating the restoration to employment of certain employees of the state, political subdivision, state institutions, county or municipality thereof, *who serve in the Armed Forces of the United States* . . .(our emphasis).

The amendment to Section 1 grants benefits to those who leave their positions "for the purpose of entering the Armed Forces of the United States" . . . Acts of the 60th Legislature 1074, Chapter 469 (App. 10, infra). The State Civil Service Act applicable to firemen and policemen requires Civil Service Commissions to grant military leaves of absence to officers who desire to "enter the military service". (App. 17, 33a). It is anomalous that Petitioner cannot be denied the right to enter the service and yet cannot contribute to his pension fund in view of

state and federal acts which provide that participation in pension benefits while in the military are a perquisite of seniority, status or pay. Section 3 of Article 6252-4a and *Alabama Power Company v. Davis,* 431 U.S. 581.

The Texas Attorney General has opined that Article 6252-4a (App. 16, 30a) conforms with the requirements of the Federal Veterans Reemployment Rights Statute, 38 U.S.C. 2021 et seq.

E. ONLY FIELD PREEMPTION MANDATES EXCLUSIVE FEDERAL JURISDICTION

The court below held that Petitioner's suit was exclusively preempted by the Federal Acts. This cannot be because the Congress has not completely displaced state regulation. Under these circumstances the Veterans Acts preempt state law only to the extent that they actually conflict with federal law. This conclusion is inescapable because the Congress has specifically authorized the states to legislate in this area. *California Federal Savings and Loan Association v. Guerra,* 479 U.S. 272; 51 U. Chi. L. Rev. 634, 664, 665.

Finally, it was Respondent's burden to show that Petitioner's cause of action was preempted by showing the similarity of issues and remedies that Petitioner could obtain in a federal court. *International Longshoreman's Association v. Davis,* 476 U.S. 380; *Belknap v. Hale,* 463 U.S. 491; *Franchise Tax Board of the State of California v. Construction Laborers Trust for Southern California,* 463 U.S. 1.

The Federal Acts do not authorize the recovery of attorney's fees but the Texas Civil Practice and Remedies

Code does. (Sections 37.009 and 38.001, App. 11 and 12, 25a and 26a, respectively). The rights which Plaintiff seeks to enforce are congruent and supplemental to the Congressional scheme and the Texas Courts are the proper forum.

—o—

CONCLUSION

The Writ of Certiorari should be granted and the judgment of the Texas Supreme Court and the lower courts reversed.

Respectfully submitted,

MAYO J. GALINDO
7718 Broadway
San Antonio, Texas 78209
(512) 828-6777
State Bar No. 07580000

Attorney for Petitioner

APPENDIX

October 15, 1985

Robert W. Lott
9819 Larkspur Lane
Oklahoma City, Ok.
73159

San Antonio Fire & Police Pension Fund
Lt. Al Peeler
Sgt. Horace Neaves
105 W. Laurel
San Antonio, Texas 78212

Dear Sirs,

On March 27, 1980 I was indefinitely suspended from the San Antonio Police Department. On August 10, 1982 I was reinstated with full back pay and all other emoluments lost. I was also granted Military Leave for the period of August 10, 1982 to May 30, 1986 because while seeking employment with the Air Force, it was necessary to incur a four year active duty commitment.

This is to advise you that I will be returning to resume my duties as a Sergeant on the San Antonio Police Department and I wish to pay back into the pension fund for the period of March 27, 1980 to May 30, 1986.

Please advise me of the amount, method of payment, and location to which you want the funds sent. Your cooperation in this matter would be appreciated.

Yours truly,
/s/ Robert W. Lott
Robert W. Lott

cc: Chief Charles Rodriguez
Mayo Galindo, Attorney at Law

HARVEY L. HARDY
Attorney at Law
2008 Northwest Military Highway
San Antonio, Texas 78213

October 28, 1985

Telephone 341-6642
Area Code 512

Mr. Robert W. Lott
9819 Larkspur Lane
Oklahoma City, OK 73159

Re: San Antonio Firemen &
Policemen's Pension Fund

Dear Mr. Lott:

I am writing you at the direction of the Firemen and Policemen's Pension Fund Board of Trustees of San Antonio, Texas.

Your letter of October 15, 1985, has been received and contents duly noted.

You are, of course, entitled to pay back in for the period of your indefinite suspension.

However, it appears that you are ineligible for military credit. Art. 6243f, Sec. 7(c), provides back credit only for those "who are *called* to active military service." As the Board has always interpreted this language it does not include those who enlist or volunteer for active service but only those who are drafted *or* involuntarily called up from the reserves or guards and not then by any prearrangement or understanding.

If you want a hearing before the Board, you are, of course, entitled to request one.

I will be glad to undertake to answer any questions you might have.

Yours very truly,
/s/ Harvey L. Hardy
Legal Advisor
HLH:jsb

NO. 86-CI-01955

ROBERT W. LOTT	)	IN THE DIS-
	)	TRICT COURT
v.	)	OF BEXAR
	)	COUNTY,
FIREMEN AND POLICEMEN'S	)	TEXAS
PENSION FUND BOARD OF	)	
TRUSTEES OF SAN ANTONIO,	)	225th JUDICIAL
TEXAS	)	DISTRICT

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Because of changed circumstances Plaintiff now files his first amended original petition. This is a suit for mandatory injunction against the trustees who administer the Defendant Pension Fund and in the alternative for writ of mandamus. Likewise for declaratory judgment to construe the phrase "called to active military service" in Section 7(c) of Article 6243f, Texas Revised Civil Statutes, and to establish and declare the legal rights, obligations and jural relationships that exist between the parties.

This Court has jurisdiction of the injunctive and mandamus proceedings pursuant to Article 55, Section 8, Texas Constitution, and as to injunctive relief pursuant further to the provisions of Section 65.021 of the Texas Civil Practice and Remedies Code. It further has jurisdiction over the proceedings for declaratory judgment under the provisions of Sections 37.002 et seq. of the Civil Practice and Remedies Code. Additionally, the monies in question exceed the minimum jurisdictional amount of this Court.

I.

Plaintiff, ROBERT W. LOTT is a member of the San Antonio Police Department who was previously granted military leave by the San Antonio Firemen and Policemen's Civil Service Commission on August 10, 1982 for the period from August 10, 1982, through May 29, 1986. On May 30, 1986, Plaintiff, who then held the rank of captain was honorably discharged from the United States Air Force and was reinstated to his former position of sergeant in the San Antonio Police Department on July 12, 1986. The Defendant, Firemen and Policemen's Pension Fund Board of Trustees of San Antonio, Texas are the fiduciaries who administer the Pension Fund and are comprised of active and retired members of the San Antonio Fire and Police Departments as well as the Mayor of the City of San Antonio and two members of the City Council who also serve on the Defendant Board. The Board is a statutory agency and arm of the City of San Antonio and is a political subdivision of the State of Texas within the meaning of Title 38, Section 2021 et seq. of the United States Code which govern these proceedings. Process on said Defendant may be effected by serving its Secretary, Sgt. Horace Neaves of the San Antonio Police Department at its offices, 105 W. Laurel, San Antonio, Texas 78212.

II.

The Plaintiff's pension rights as an officer of the San Antonio Police Department are governed by Article 6243f, Texas Revised Civil Statutes, which partially provides in Section 7(c) that as a prerequisite to the reinstatement of Petitioner's pension rights that he file a written statement

of intent with the Secretary of the Pension Fund within ninety (90) days of his return to such active status and likewise pay into the Pension Fund the monies which he would have otherwise paid into the Fund had he remained on active status during the period of his absence in military service.

III.

Plaintiff has previously made his request to the Defendant Trustees to make these contributions upon his return from active duty in the United States Air Force. On January 27, 1986, the Trustees advised Plaintiff's counsel that they would refuse his monies at such time as he were reinstated to active duty in the San Antonio Police Department. They continue to do so following Plaintiff's reinstatement to the San Antonio Police Department. Under these circumstances the Defendant's actions constitute a breach of the Plaintiff's contract of employment with the San Antonio Police Department.

IV.

The specific basis for the controversy is that Plaintiff is a reservist in the United States Air Force who made himself available and was subsequently ordered to duty into active service of the United States Air Force where he served the Armed Forces for approximately four years. It is the position of the Defendant Trustees that the Petitioner was not "called" to active military service but that he rather volunteered and accordingly is not entitled to contribute to the Pension Fund for said four year period of active duty with the United States Air Force.

V.

Plaintiff further contends that his right to contribute funds is absolute and cannot be abridged or diminished by the Defendant Trustees irrespective of the fact that he may have volunteered for active duty; that nonetheless, he was ordered into the United States Air Force although he may have made himself available for such service. In this respect the Plaintiff contends that his rights are governed by Title 38, Sections 2021(a)(b) et seq. of the United States Code which, as construed by the Federal Courts, give this Plaintiff the right to contribute to his pension fund for the time in the Armed Forces whether he "volunteered" or was "ordered" or "called" to active duty. That under the Federal Law it is immaterial how Petitioner gained entry into the Armed Forces of the United States. He is entitled to contribute to his pension fund unfettered so long as his active duty does not exceed four years and provided further that he be honorably discharged.

VI.

Pleading further, Plaintiff says that these Federal Statutes supersede any Texas Statutes to the contrary pursuant to the Supremacy Clause of the United States Constitution, Article 1, Section 8, Clause 12 which preempts states from enacting legislation limiting or restricting such congressional power. In this respect Plaintiff says that the phrase in Section 7(c) of Article 6243f, supra. "called to active military service" means entry into the Armed Forces of the United States whether called, ordered or through the prearrangement of making oneself available for such call. As so construed this Section of the Statute

would be consistent with the Federal Statutes which this Petitioner says preempt the subject matter. If, however, the phrase "called to active military service" as found in Section 7(c) of this Pension Statute is to be construed so as to preclude this Petitioner from making contributions because of any prearrangements where he made himself available to be ordered to active service, then such Section of the Statute is unconstitutional as being in violation of and in express derogation of the Federal Statutes cited above. Accordingly, Plaintiff shall forward a copy of this Petition to Hon. Jim Mattox, Attorney General of the State of Texas, pursuant to the requirements of Section 37.006(b) of the Texas Civil Practice and Remedies Code.

VII.

Because of the genuine controversy that exists between the parties, Plaintiff should have a declaratory judgment establishing the respective rights and obligations as between the parties and their respective jural relationships. Specifically, Plaintiff should have a declaratory judgment construing the phrase "called to active military service" as found in Section 7(c) of Article 6243f, Texas Civil Statutes to mean entry upon active duty, whether or not voluntary, in the Armed Forces of the United States in response to an order or call to such active duty.

VIII.

Plaintiff would further show that he has retained the services of the undersigned attorney who is a licensed, practicing attorney in the State of Texas and before this court and that he should recover his reasonable attorney's fees for services previously rendered and to be rendered

by said attorney to him in these proceedings. These attorney's fees are authorized to be awarded Plaintiff pursuant to the provisions of Section 37.009 of the Texas Civil Practice and Remedies Code (The Uni[illegible]. Declaratory Judgments Act) and pursuant further to Section 38.001 of the Texas Civil Practice and Remedies Code.

PREMISES CONSIDERED, Plaintiff prays that Defendants be duly cited to appear and answer herein, and that upon final hearing hereof Plaintiff have a mandatory injunction or in the alternative a writ of mandamus requiring the Firemen and Policemen's Pension Fund Board of Trustees of San Antonio, Texas to accept the contributions which he may tender within the statutorily permissible time to equal the monies which he would have otherwise paid as an active member of the San Antonio Police Department but for his military service for said four year period in the U.S. Air Force, that he further have a declaratory judgment construing the phrase "called to active military service" as found in Section 7(c) of Article 6243f consistent with the views expressed hereinabove, that he further recover his reasonable attorney's fees and costs of court, for general and special relief, whether at law or in equity, and that such further orders be made herein as to the court may seem proper.

Respectfully submitted,

/s/ Mayo J. Galindo
7718 Broadway
San Antonio, Texas 78209
512/828-6777
State Bar No. 07580000
Attorney for Plaintiff

STATE OF TEXAS)
)
COUNTY OF BEXAR)

MAYO J. GALINDO, being by me first duly sworn upon his oath deposes and says:

I am the attorney for Plaintiff, ROBERT W. LOTT, have personal knowledge of the matters contained in this petition and they are true and correct.

/s/ Mayo J. Galindo

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, by the said MAYO J. GALINDO, to certify which, witness my hand and seal of office this 14th day of July, A.D., 1986.

/s/ Dolores Leal
Notary Public, State of Texas

CERTIFICATE OF SERVICE

To certify that a copy of Plaintiff's First Amended Original Petition was delivered by the undersigned the 15th day of July, 1986, to Mr. Harvey L. Hardy, Attorney for Defendant at his offices, 560 GPM Building-South Tower, 800 N.W. Loop 410, San Antonio, Texas.

/s/ Mayo J. Galindo

NO. 86CI-01955

ROBERT W. LOTT	)	IN THE
	)	DISTRICT
	)	COURT OF
VS.	)	BEXAR
	)	COUNTY,
	)	TEXAS
FIREMEN AND POLICEMEN'S	)	
PENSION FUND BOARD OF	)	225TH
TRUSTEES OF SAN	)	JUDICIAL
ANTONIO, TEXAS	)	DISTRICT

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the FIREMEN AND POLICEMEN'S PENSION FUND BOARD OF TRUSTEES OF SAN ANTONIO, TEXAS, Defendant in the above styled and numbered cause, and in reply to "Plaintiff's First Amended Original Petition" would file this its "Defendant's First Amended Original Answer," and for such answer would show as follows:

I

Defendant denies all allegations in said petition contained and demands strict proof of same.

II

Defendant specially denies that plaintiff was "called to active military service" as that phrase is used in Article 6243f, Section 7(c), or as it has been construed by defendant Board for many years, or according to its popular usage and as it is commonly understood.

III

Defendant specially denies that its organic act, Article 6243f, Revised Civil Statutes of Texas, is preempted by any Federal statutes insofar as the subject matter of this suit is concerned.

IV

Defendant specially denies that "the Board is a statutory agency and arm of the City of San Antonio and is a political subdivision of the State of Texas. . ." as plead in the petition, paragraph I, page 2. The exact contrary is established law. *Bolen v. Board,* 308 S.W.2d 904, (Tex. Civ. App.—San Antonio 1958, writ refused).

Defendant is a statutory trust, separate from and independent of the City of San Antonio, a municipal corporation, and is not a governmental subdivision. The nine member Board of Trustees is dominated by three policemen and three firemen elected by their peers (one of each being retired and elected by fellow retires, two of each being elected by active duty policemen and firemen, respectively). The Mayor of the City serves *ex officio* by statute and two councilmen are appointed by the Council. Art. 6243f, Sec. 1 and 1(A).

V

Pleading affirmatively, Defendant would show (1) that its organic act (Article 6243f) is constitutional; (2) that the pension entitlements of the members of the Fund are a part of their compensation as firemen and policemen (whether realized or inchoate); (3) that if such entitlements were a gratuity or donation to the members of the fund as a reward for length of service, Article 6243f would

be unconstitutional as in violation of the Texas Constitution, Art. III, Secs. 51, 52, and 53; (4) that said Fund is not in any real sense a vested fund but a mere creature of the Legislature, which can change or abolish it at any time; (5) that the so-called "contributions" of the members deducted from their pay (and double matched at the source) remains public money and never becomes the property of said members; (6) that membership in the Fund is mandatory and there is never any refund of such contributions (the constitutionality and validity of which provision of Article 6243f has been upheld at the highest court levels of both the State of Texas and the United States of America); (7) that such part of the member's pay deducted at the source for the benefit of the Fund is not taxable income to such members and no income tax is ever paid thereon by them; and (8) compensation (including pension entitlements under Art. 6243f) does *not* fall under the purview of the Federal Statute cited by plaintiff because it [the Statute] "does not grant veterans the right to compensation for work they have not performed." *Alabama Power Company vs. Davis,* 431 U.S. 581, 52 L.Ed.2d 595, 97 S.Ct. 2002 (1977), (52 L.Ed.2d at p. 604).

VI

Plaintiff misrepresents the true nature of this Fund (as set out in Article 6243f), implying that it exists only as a pension plan to merely provide retirement pensions after various periods of service as a reward for length of service in either the fire or police department based upon the period of time served.

Plaintiff's suit is not in fact one to secure the privilege of paying money into said fund but is in fact one to

secure credit toward a retirement pension for service as a policeman for a period of about four years when he voluntarily absented himself from such employment and did no species of service as such policeman. The payment into the Fund is merely to be made as a prerequisite to giving credit for an unearned increment of four years "service." The "paying in" provision of Sec. 7(e) was intended by the Legislature to protect those members who were involuntarily pressed into military service ("called to active duty") and not to reward those who would seek to earn a retirement pension without actually doing more than nominal service as a fireman or policeman.

VII

Defendant Fund is unique in many respects, as set out in the two preceeding paragraphs. It operates on different principles than any pension fund covered by the Federal statutory provisions. All case law on the subject concerns pension plans substantially different from Defendant's pension system in many important respects. Some of these differences are:

(a) Compensation: Pensions under Defendant's system (including inchoate or prospective entitlements) are strictly part of the members' compensation as firemen or policemen and not rewards or gratuities for length of service.

(b) Non-refundability: "Contributions" by members remain public money—title never passes to the members, there is never any refund of contributions under any circumstances and never any withholding or income tax paid thereon by members.

(c) Defendant's Fund includes generous benefit entitlements which have no relationship to length of service (death or disability) and benefit entitlements for many classes other than members (widows, minor children, retarded children, school age children, dependent parents—all, of course, related to members but having nothing to do with length of service).

(e) Membership in the Fund is mandatory as its benefits are part of their compensation as firemen and policemen.

VIII

The Federal Statute relied upon by Plaintiff, Title 38, Sec. 2021 et seq, does not authorize the recovery of attorney fees. By plaintiff's own theory of preemption plaintiff's claim for attorney fees is barred. In the alternative, should Plaintiff be entitled to recover attorney fees under Sec. 37.009 of the Texas Civil Practice and Remedies Code, Defendant, by the same token, would be entitled to recover its reasonable attorney fees in this entire declaratory judgment action.

IX

Defendant seeks a declaratory judgment herein in line with its affirmative pleading set out in paragraphs IV through VI, inclusive.

WHEREFORE, Defendant prays that Plaintiff take nothing by this suit and that Defendant have declaratory judgment declaring (1) that the phrase "called to active military service" in section 7(e) of Art. 6243f does not include a member of the pension fund who volunteers for

the service in question (whether already a member of a reserve component or National Guard unit or not); and (2) that such provision (as thus interpreted) is legal and binding according to the provisions of said section and of Art. 6243f generally. Further, Defendant prays that Plaintiff, in any event, be denied attorney fees or, in the alternative, that it be awarded its reasonable attorney fees and costs of court.

Respectfully submitted,

/s/ Harvey L. Hardy
HARDY SCHWARTZMAN BAHAN & JACOBSON, P.C.
SB #08986000
800 N.W. LOOP 410
560 GPM SOUTH TOWER
SAN ANTONIO, TEXAS 78216
Phone: 512/341-1333

CERTIFICATE

Undersigned hereby certifies that a true copy of above Defendant's Original Answer has been mail, Certified—Return Receipt Requested, to attorney for plaintiff, Mayo J. Galindo, 7718 Broadway, San Antonio, Texas 78209, on this 16 day of July, 1986.

/s/ Harvey L. Hardy

NO. 86-CI-01955

ROBERT W. LOTT	)	IN THE
	)	DISTRICT
	)	COURT OF
v.	)	BEXAR
	)	COUNTY, TEXAS
	)	
FIREMEN AND POLICEMEN'S	)	225TH
PENSION FUND BOARD OF	)	JUDICIAL
TRUSTEES OF SAN	)	DISTRICT
ANTONIO, TEXAS	)	

JUDGMENT

The 6th day of August, 1966, came on to be heard the above styled and captioned cause, and came the Plaintiff in person and by his attorney of record, Mayo J. Galindo, Esq., and came also the Defendant, Firemen and Policemen's Pension Fund Board of Trustees of San Antonio, Texas, by and through its duly authorized representatives and came also its attorney, Harvey L. Hardy, Esq. The parties announced ready, and a jury having been waived, thereupon all matters in controversy, as well of fact as of law were submitted to the court.

There upon the Defendant filed a plea to the jurisdiction of this court to entertain this cause and the court having heard and considered the same and the argument of counsel is of the opinion and finds that same should be overruled, and it is accordingly ORDERED and DECREED that Defendant's plea to the jurisdiction be denied. To which action of the court in overruling its plea to the jurisdiction the Defendant Board in open court duly excepted. The Defendant then further presented to the court its motion for leave to file a trial amendment to De-

fendant's first amended original answer which motion was granted by the court and Defendant's trial amendment shall be considered among other pleadings filed by the Defendant as its first trial amendment to its first amended original answer previously filed in this cause.

The court having considered the stipulations of fact previously entered into between the parties and filed with the clerk of this court, the evidence presented by the parties, the parties' trial briefs, and the argument of counsel, is of the opinion and finds that the law and facts are with the Plaintiff.

The court is of the opinion and finds that the provisions of Title 38 U.S.C. 2021 et seq., The Veterans Federal Reemployment Rights Acts, have preempted the states with respect to veterans' job benefits as they relate to their perquisites of seniority, status or pay, and for that reason,

IT IS THEREFORE ORDERED AND DECREED that Plaintiff have declaratory judgment construing the phrase "called to active military service" as found in Section 7c of Article 6243f, Vernon's Annotated Texas Civil Statutes to mean one who enters upon active duty, whether or not voluntarily, in the Armed Forces of the United States in response to an order or call.

IT IS FURTHER ORDERED AND DECREED that Plaintiff have a permanent mandatory injunction requiring the Defendant, Firemen and Policemen's Pension Fund Board of Trustees of San Antonio, Texas, its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them who receive actual notice of this injunction by personal service

or otherwise, to accept the Plaintiff's tender of the sum of Ten Thousand Six Hundred Fifty-Eight and 08/100 Dollars ($10,658.08) as his contributions to the Defendant Pension Fund for the period from August 10, 1982, through May 29, 1986, and that upon receipt of these funds by the Defendant Board that its records reflect the Plaintiff to have been a contributing member of said Pension Fund for such period of time for retirement purposes.

IT IS FURTHER ORDERED AND DECREED that Plaintiff do have and recover of and from said Defendant the sum of Twelve Thousand Three Hundred Two and 50/100 Dollars ($12,302.50) as reasonable attorney's fees for services rendered up and through the trial of this cause.

IT IS FURTHER ORDERED that Plaintiff further recover of and from said Defendant the sum of Five Thousand and No/100 Dollars ($5,000.00) as his reasonable attorney's fees if an appeal is prosecuted to the Court of Appeals for the Fourth Supreme Judicial District sitting at San Antonio, Texas, and that Plaintiff further recover of and from said Defendant as his reasonable attorney's fees the sum of Two Thousand Five Hundred and No/100 Dollars ($2,500.00) if an application for writ of error is thereafter perfected to the Texas Supreme Court. In the event that such application for writ of error is granted by the Texas Supreme Court it is further ordered that Plaintiff further recover of and from said Defendant the additional sum of Two Thousand Five Hundred and No/100 Dollars ($2,500.00) as his reasonable attorney's fees for the consideration of the appeal by said court.

Finally, it is ordered that all costs of court be assessed against the Defendant, Firemen and Policemen's Pension Fund Board of Trustees of San Antonio, Texas.

SIGNED this 25th day of August, 1986.

/s/ Carolyn H. Spears
Judge Presiding

APPROVED AS TO FORM ONLY:

/s/ Mayo J. Galindo,
Attorney for Plaintiff

/s/ Harvey L. Hardy,
Attorney for Defendant

FIREMEN AND POLICEMEN'S PENSION FUND BOARD OF TRUSTEES OF SAN ANTONIO, TEXAS,

Appellant,

v.

Robert W. LOTT, Appellee.

No. 4-86-00589-CV.

Court of Appeals of Texas,
San Antonio.

Oct. 28, 1987.

Rehearing Denied Dec. 9, 1987.

Pension fund beneficiary brought action against board of trustees of pension fund for fire fighters and police officers to obtain mandatory injunction and declaratory relief to secure credit for voluntary time served in military. The 225th District Court, Bexar County, Carolyn Spears, J., entered judgment in favor of beneficiary. Board appealed. The Court of Appeals, Chapa, J., held that federal courts have exclusive jurisdiction to enforce provisions of Vietnam ERA Veterans' Readjustment Assistance Act.

Reversed.

OPINION

CHAPA, Justice.

This appeal involves a suit by appellee Robert W. Lott against appellant, Firemen and Policemen's Pension Fund Board of Trustees of San Antonio, Texas (Board), for a mandatory injunction and declaratory judgment to secure credit for voluntary time served in the military against that requisite for retirement pension under Sec-

tion 7(e) of article 6243f, Vernon's Revised Civil Statutes. The trial court rendered judgment in favor of Lott, and Board appeals from that judgment.

The issue before us is whether the Federal District Court has exclusive jurisdiction of the matter. We reverse and dismiss.

The lawsuit is brought in state court by Lott seeking to enforce in effect the provisions of Federal Law, 38 U.S.C. § 2021-2024 inclusive which grants credit for voluntary and involuntary military service. Because the state statute, article 6243f, § 7(c), limits military credit to involuntary service, Lott insists that 38 U.S.C. § 2021-2024 preempts the state law and is applicable to credit Lott for his voluntary service. Board insists that the federal courts have exclusive jurisdiction to enforce 38 U.S.C. § 2021-2024 and that Lott is before the wrong forum. Lott concedes in oral argument that without the provisions of 38 U.S.C. § 2021-2024, his cause of action fails and that if the federal courts have exclusive jurisdiction, he is in the wrong forum. However, Lott disagrees that the federal courts have exclusive jurisdiction.

Where the intent of an act is obscure, appellate courts may consider the legislative history in determining the intent of the legislature. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547 (Tex.1981); *Harris v. City of Fort Worth*, 142 Tex. 600, 180 S.W.2d 131, 133 (1944).

The federal law involved is commonly known as "Vietnam ERA Veteran's Readjustment Assistment Act of 1974" and its legislative history is found in Senate Re-

port No. 93-907, Calendar No. 879.[1] The report recognizes that some states are reluctant to protect the returning veterans in the field of reemployment, seniority, and pension rights.[2] It makes clear the intent of the legislature

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1. Senate Report No. 93-907, p. 1, Vietnam ERA Veterans' Readjustment Assistance Act of 1974.

> The Committee on Veterans' Affairs, to which was referred the bill (S. 2784) to amend title 38, United States Code . . . *to recodify and expand veterans' reemployment rights;* to make improvements in the administration of education benefits; and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass. (Emphasis added).

2. Senate Report No. 93-907, p. 110:

> Although a number of States have enacted legislation providing reemployment rights to veterans, the coverage, the rights provided, and the availability of enforcement machinery all vary considerably from state to state. Also, some State and local jurisdictions have demonstrated a reluctance, and even an unwillingness, to reemploy the veteran. Or if they do, they seem unwilling to grant them seniority or other benefits which would have accured [sic] to them had they not served their country in the military.
>
> In a comparable employment field, in 1972, the Congress extended the powers of the United States Equal Employment Opportunity Commission to investigate complaints of discrimination in employment by State and local governments based on reasons of race, ethnic origin, and sex, and authorized action in court to seek corrective measure.
>
> Senator Jennings Randolph, a senior member of the Committee on Veterans' Affairs, introduced legislation in the first session of the 93d Congress, to include State and local governments under the provisions of Section 9 of the Military Selective Service Act.
>
> The Committee believes that the provisions of 50 U.S.C. App. 59, subsections (b) through (h), which deal strictly with the reemployment rights of veterans, more logically belong in title 38, which deals with Veterans' Benefits.

(Continued on following page)

that all veterans be treated equitably.[3] It pointedly exempts from abrogation any state laws which provide "greater or additional rights or protections" to the veterans.[4] Finally, the report set out the specific and unequivocal congressional intent that the federal court have exclusive jurisdiction.[5]

(Continued from previous page)

The Committee also believes it to be logical and consistent with congressional intent to extend these same rights to veterans who had been employed by State and local governments as well. For this reason, the bill as reported would amend veterans' reemployment rights law to extend coverage to State governments and their political subdivisions.

3. Senate Report No. 93-907, p. 110-111:

Subsections (a) and (b). Recodify existing law concerning the reemployment of persons inducted into the Armed Services as well as extend reemployment rights to those veterans who were employed by State or local governments or other political subdivisions prior to entering military service. These veterans are not currently protected under existing Federal law and must rely on the vagaries of State law and local ordinances which are not usually as comprehensive as the Federal law which are infrequently enforced in State courts. The proposed amendment to the recodification would make clear congressional intent that all veterans, regardless of who their preservice employers were, should receive equitable treatment in the matter of reemployment rights.

4. Senate Report No. 93-907, p. 111:

Subsection (c). Provides that State laws or local ordinances which establish greater or additional rights or protections for State and local employees than those provided by this chapter shall not be abrogated by this chapter. This is in keeping with the Committee's belief that when State and local governments provide returning veterans with greater rights and protections that those provided by existing Federal statute, the veterans should be able to utilize these rights and protections as well.

5. Senate Report No. 93-907, p. 111:

§ 2022. Enforcement Procedures.

(Continued on following page)

In *McKinney v. Missouri-Kansas-Texas Railroad Company, et al.*, 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed. 1305 (1958), the Supreme Court of the United States was faced with a claim of a veteran to enforce his re-employment rights under a predecessor statute to the Vietnam ERA Veterans' Readjustment Assistance Act of 1974. Universal Military Training and Service Act § 9, 62 Stat. 604, 614-618, as amended, 50 U.S.C. App. § 459, as amended, 50 U.S.C.App. (Supp.V) § 459. In recognizing that the "distinctively federal rights" of veterans require federal protection, the Supreme Court stated:

> Petitioner sues not simply as an employee under a collective bargaining agreement, but as a veteran *asserting special rights* bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces.
>
> For the effective protection of these *distinctively federal rights*, Congress provided in § 9(d) of the Act that if any employer fails to comply with the provisions of the statute, the District Court, upon the filing of a petition by a person entitled to the benefits of the Act, has jurisdiction to compel compliance and to

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(Continued from previous page)

In addition to recodifying existing law, this section extends to employees of State and local governments and other political subdivision enforcement rights in the same manner and to the same extent as are currently provided for employees for private employers, including the specific right to have their legal rights litigated in the Federal courts. The amendments would also provide, among other things, that these public employees could be represented in these proceedings in Federal court by the appropriate United States Attorney. *These amendments make specific and unequivocal the congressional intent that the Federal courts shall be the forum for the determination of reemployment rights of these public employees.* (Emphasis added).

> compensate for loss of wages . . . On the contrary, the statutory scheme contemplates the speedy vindication of the veterans' rights by a suit *brought immediately in the District Court,* advanced on the calendar before other litigation, and prosecuted with the assistance of the United States attorney. Only thus, it evidently was thought, would adequate protection be assured the veteran, since delay in the vindication of reemployment rights might often result in hardship to the veteran and the defeat, for all practical purposes, of the rights Congress sought to give him. (Emphasis added).

McKinney v. Missouri-Kansas-Texas Railroad Company, et al., 357 U.S. at 268-70, 78 S.Ct. at 1224-25.

In *Jennings v. Illinois Office of Education,* 589 F.2d 935 (1979), the United States Court of Appeals, Seventh Circuit recognized the intent of Congress to grant exclusive jurisdiction to the federal courts under the Vietnam ERA Readjustment Assistance Act of 1974 by declaring:

> Moreover, the Senate Report accompanying the 1974 amendment to the statute shows that Congress wanted Veterans who had been employed by state governments to have their legal rights litigated in the federal courts, so that their reemployment rights might be determined in such a forum. S.Rep. No. 93-907, 93d Cong.2d Sess. p. 111.

Jennings v. Illinois Office of Education, 589 F.2d at 938.

Likewise, the federal court in *Kidder v. Eastern Airlines, Inc.,* 469 F.Supp. 1060 (S.D.Fla.1978), speaking of the same act stated:

> . . . for the federal courts are the exclusive forum for the vindication of 'these distinctively federal rights' (*McKinney v. Missouri-K.T.R. Co., supra,* 357 U.S. at

269, 78 S.Ct. 1222 [at 1225]). See also *Brink v. Transit-Mix Concrete Corp.*, 83 CCH Labor Cases § 10,463 at pp. 17,860-17,861 (S.D.N.Y.1978).

Kidder v. Eastern Airlines, Inc., 469 F.Supp. at 1065.

We hold that the federal courts have exclusive jurisdiction to enforce the provisions of the Vietnam ERA Veterans' Readjustment Assistance Act of 1974. The judgment is reversed and the cause is dismissed.

SUPREME COURT OF TEXAS

P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

May 25, 1988

Mr. Mayo J. Galindo
7718 Broadway
San Antonio TX 78209

Mr. Harvey L. Hardy
Hardy, Schwartzman, Bahan & Jacobson, P.C.
560 GPM South Tower
800 N. W. Loop 410
San Antonio TX 78216

RE: Case No. C-7151

STYLE: ROBERT W. LOTT
v. FIREMEN AND POLICEMEN'S PENSION FUND BOARD OF TRUSTEES OF SAN ANTONIO, TEXAS

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, Writ Denied.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ Blanca E. Morin
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

June 29, 1988

Mr. Mayo J. Galindo
7718 Broadway
San Antonio TX 78209

Mr. Harvey L. Hardy
Hardy, Schwartzman, Bahan & Jacobson, P.C.
560 GPM South Tower
800 N. W. Loop 410
San Antonio TX 78216

RE: Case No. C-7151

STYLE: ROBERT W. LOTT
v. FIREMEN AND POLICEMEN'S PENSION FUND BOARD OF TRUSTEES OF SAN ANTONIO, TEXAS

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ Blanca E. Morin
Deputy

Sec. 7(c). Members of this Pension Fund who are called to active military service shall not be required to make the monthly payments into the fund provided for in this Act as long as they are thus engaged in active military service, nor shall they lose any seniority rights or retirement benefits provided for in the Act by virtue of such military service, provided that after their reinstatement to an active status in either the fire or police department they must file a written statement of intent with the secretary of the Pension Fund within 90 days of their return to such active status to pay into the Pension Fund an amount equal to what they would have paid in if they had remained on active status in the department during the period of their absence in military service and make such payment in full within an amount of time after their return equal to the time they were absent, in each case, or forever lose all credit toward a retirement pension for the length of time such member was engaged in active military service. No disability resulting from either injury or disease contracted after the effective date of this Act while engaged in military service shall ever entitle a member of the fund to a disability pension. When payments are made into the fund by a member pursuant to this section, the city shall double match such payment.

* * *

PUBLIC EMPLOYEES—ACTIVE MILITARY SERVICE

CHAPTER 469[69]

H. B. No. 696

An Act providing for and regulating the restoration to employment of certain employees of the State, political subdivision, state institution, county or municipality thereof, who serve in the Armed Forces of the United States, Texas National Guard; repealing Chapter 107, Acts of the 52nd Legislature, 1951; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Any employee of the State of Texas or any political subdivision, state institution, county or municipality thereof, other than a temporary employee, an elected official, or one serving under an appointment which requires confirmation by the Senate, who leaves his position for the purpose of entering the Armed Forces of the United States, or enters State service as a member of the Texas National Guard or Texas State Guard or as a member of any of the reserve components of the Armed Forces of the United States shall, if discharged, separated or released from such active military service under honorable conditions, be restored to employment in the same department, office, commission or board of the State of Texas or any political subdivision, state institution, county or municipality thereof, to the same position held at the time of induction, enlistment or order to active Federal or State military duty or service, or to a position of like seniority,

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69. Vernon's Ann. Civ.St. art. 6252—4a, §§ 1-6.

status, and pay if still physically and mentally qualified to perform the duties of such position.

Sec. 2. If such person is not qualified to perform the duties of such position by reason of disability sustained during such military service but qualified to perform the duties of another position in the same department, office, commission or board of the State of Texas or any political subdivision, state institution, county or municipality thereof, the veteran shall be restored to employment in such other position, the duties of which the veteran is qualified to perform as will provide like seniority, status, and pay, or the nearest possible approximation thereof.

Sec. 3. Any person who is restored to a position in accordance herewith shall be considered as having been on furlough or leave of absence during such absence in Federal or State military service, and shall be entitled to participation in retirement or other benefits to which employees of the State of Texas or any political subdivision, state institution, county or municipality thereof, are, or may be, entitled and shall not be discharged from such position without cause within one year after such restoration.

Sec. 4. Veterans eligible for restoration to employment hereunder shall make written application for such restoration within ninety days after discharge or release from active Federal or State military service, to the head of the department, office, commission or board of the State of Texas or any political subdivision, state institution, county or municipality thereof, in or by which such veteran was employed prior to entering such military ser-

vice and shall attach thereto evidence of discharge, separation, or release from such military service under honorable conditions.

Sec. 5. In case any person acting in a public capacity fails or refuses to comply with the provisions hereof, the district court of the district in which such person is a public official, shall have power, upon the filing of a motion, petition or other appropriate pleading by the person entitled to the benefits of such provisions to specifically require such public official to comply with such provisions. The court shall order a speedy hearing in any such case, and shall advance it on the calendar. Upon application to the district attorney for the pertinent district by any person claiming to be entitled to the benefits of such provisions, such district attorney, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require the compliance with such provisions; provided, that no fees or court costs shall be taxed against the person so applying for such benefits.

Sec. 6. Chapter 107, Acts of the 52nd Legislature, 1951, is repealed.[70]

Sec. 7. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three

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70. Vernon's Ann.Civ.St. art. 6252—4.

several days in each house be suspended, and this Rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed by the House on May 9, 1967, by a non-record vote; passed by the Senate on May 25, 1967; Yeas 31, Nays O.

Approved June 12, 1967.

Effective Aug. 28, 1967, 90 days after date of adjournment.

Texas Declaratory Judgment Act

§ 37.009. Costs

In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.

§ 38.001. Recovery of Attorney's Fees

A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

(1) rendered services;

(2) performed labor;

(3) furnished material;

(4) freight or express overcharges;

(5) lost or damaged freight or express;

(6) killed or injured stock;

(7) a sworn account; or

(8) an oral or written contract.

38 § 2021 3(c). The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.

38 § 2022. Enforcement procedures

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of Section 2021(a), (b)(1), or (b)(3), or 2024 of this title, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for

such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter.

§ 1446. Procedure for removal

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(SEAL)

THE ATTORNEY GENERAL OF TEXAS

December 20, 1979

Honorable Norman V. Suarez
General Counsel
Texas Department of
Public Safety
Box 4087
Austin, Texas 78773

Opinion No. MW-109

Re: Rights of state employees to accrued sick leave when returning to state service after military leave.

Dear Mr. Suarez:

You ask several questions concerning the rights of a state employee with respect to vacation and sick leave entitlement when he returns to state employment following active military service. You inform us that an employee requested military leave to attend a military educational course and presented properly prepared orders from his National Guard commander for duty commencing March 18, 1978, and ending July 30, 1978. The employee reported for work on August 1, 1978. Prior to commencing military leave, the employee had accumulated 214 hours of sick leave. Pursuant to department policy, he was paid a lump-sum payment for his accrued vacation time.

With regard to the above facts, you ask the following questions:

1. Taking into consideration the Veterans' Reemployment Rights Statute, 38 U.S.C.A., Sec. 2021, et seq., and the applicable State statutes, should the Department under the above facts have credited the employee on reinstatement with the sick leave he had accrued on the date he left for his military leave?

2. Would the fact that the accumulated vacation leave was paid under Department policy and not requested by the employee, even though accepted by the employee, make any difference?

Article 6252-4a, V.T.C.S., provides for the restoration to employment of state employees following their discharge from military service. Section 3 of article 6252-4a provides in part as follows:

> Any person who is restored to a position . . . shall be considered as having been on furlough or leave of absence . . . and shall be entitled to participation in retirement or other benefits to which employees of the State of Texas . . . are, or may be, entitled to. . . .

The provisions of article 6252-4a conform with the requirements of the federal Veterans' Reemployment Rights Statute, 38 U.S.C. 2021, *et seq.*, section (b)(1) of which states in part:

> Any person who is restored to or employed in a position . . . shall be considered as having been on furlough or leave of absence during such person's period of training and service . . . [and] shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence. . . .

If the employee, upon restoration, is to be considered as having been on leave of absence, it follows that the sick leave accrued prior to that leave should be credited the employee as it would have been to an employee on a nonmilitary leave of absence. The fact that accumulated annual leave was paid by the department would make no difference with respect to his sick leave entitlement. The statutory mandate is clear that the restored employee should be treated as having been on furlough or leave of absence. The appropriate procedure would have been not to pay the employee for his accumulated vacation at the

time he began his military leave, but in any event 38 U.S.C. section 2021(b)(3) requires that the mistake in handling the employee's vacation entitlement not constitute a termination where none was intended.

You ask several additional questions which relate to the status of an employee while he or she is on military leave longer than the annual 15 days authorized by article 5765, V.T.C.S., for purposes of accrued vacation and sick leave entitlement.

With one exception later noted, both the relevant state and federal statutes speak only in terms of restoration of an employee who has returned to employment. In this respect they are retrospective in nature, so that whether or not the restored employee had actually terminated employment to perform military service he is to be treated *upon restoration* as if he had been on furlough or leave of absence and is entitled to the benefits allowed such an employee, including crediting of any unused vacation or sick leave.

The exception to the retrospective nature of the federal statute is subsection (d) of 38 U.S.C. section 2024 which provides that an employee other than a member of a Reserve component who is ordered to an initial period of active duty for training for at least three months shall upon request be granted a leave of absence "for the period required to perform active duty for training or inactive duty training." Certain types of duty performed by a member of the National Guard as described in subsection (f) are included as duty for which the employer may not treat the employee as terminated, but must grant the requested leave of absence, and

> Such an employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

38 U.S.C. § 2024(d).

You inquire as to the effect of carry-over provisions of state statutes on time carried forward through a leave of absence from one fiscal year to the next. Such leave would be carried over in the same manner as it would be for any other employee. While it is clearly the intent of the relevant statutes to protect the returning employee from loss of ground in his employment, it is not their intent to place him in a better position than other employees. *See Lipani v. Bohack Corp.*, 546 F.2d 487 (2d Cir. 1976); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946).

You ask, finally, whether an employee accrues either vacation or sick leave while on military leave. The U.S. Supreme Court has stated with regard to veterans' reemployment rights that vacation time should accrue during military service only where it appears that such time was "intended to accrue automatically as a function of continued association with the [employer]," and not where such benefits are "intended as a form of short-term compensation for work performed." *Foster v. Dravo Corporation*, 420 U.S. 92, 100 (1975). In this regard, Attorney General Opinion H-941 (1977) has held that vacation and sick leave benefits "are forms of compensation and generally accrue only while an employee is on the state payroll," and not payable to an employee on military leave of absence.

SUMMARY

Under article 6252-4a, V.T.C.S., and 38 U.S.C. 2021, *et seq.*, an employee who is restored to state employment following military service is generally to be considered as having been on furlough or leave of absence, and as such, is entitled to all benefits to which an employee returning from a non-military leave of absence would be entitled, including the crediting of sick leave accrued prior to such military service.

Very truly yours,

/s/ Mark White
MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

§ 143.072. Military Leave of Absence

(a) On written application of a fire fighter or police officer, the commission shall grant the person a military leave of absence without pay to enable the person to enter a branch of the United States military service. The leave of absence may not exceed the period of compulsory military service or the basic minimum enlistment period for the branch of service the fire fighter or police officer enters.

(b) The commission shall grant to a fire fighter or police officer a leave of absence for initial training or annual duty in the military reserves or the national guard.

(c) While a fire fighter or police officer who received a military leave of absence serves in the military, the commission shall fill the person's position in the department in accordance with this chapter. The fire fighter or police officer who fills the position is subject to replacement by the person who received the military leave at the time the person returns to active duty in the department.

(d) On termination of active military service, a fire fighter or police officer who received a military leave of absence under this section is entitled to be reinstated to the position that the person held in the department at the time the leave of absence was granted if the person:

(1) receives an honorable discharge;

(2) remains physically and mentally fit to discharge the duties of that position; and

(3) makes an application for reinstatement within 90 days after the date the person is discharged from military service.

(e) On reinstatement, the fire fighter or police officer shall receive full seniority credit for the time spent in the military service.

(f) If the reinstatement of a fire fighter or police officer who received a military leave of absence causes that person's replacement to be returned to a lower position in grade or compensation, the replaced person has a preferential right to a subsequent appointment or promotion to the same or a similar position from which the person was demoted. This preferential right has priority over an eligibility list and is subject to the replaced person remaining physically and mentally fit to discharge the duties of that position.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

FILED
SEP 28 1988
JOSEPH F. SPANIOL, JR
CLERK

No. 88-444

In The

Supreme Court of the United States

October Term, 1988

ROBERT W. LOTT,

Petitioner,

vs.

FIREMEN AND POLICEMEN'S PENSION FUND BOARD OF TRUSTEES OF SAN ANTONIO, TEXAS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF TEXAS

HARVEY L. HARDY
HARDY SCHWARTZMAN BAHAN
& JACOBSON, P.C.
400 GPM South Tower
800 N.W. Loop 410
San Antonio, Texas 78216
Phone: (512) 341-1333

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR DENYING THE WRIT OF CERTIORARI 4

1. FEDERAL COURT JURISDICTION IS EXCLUSIVE 5

2. THIS CASE COULD NOT HAVE BEEN REMOVED TO FEDERAL COURT 6

3. ARTICLE 6252-4a WAS NOT PLED, CITED, DISCUSSED OR ARGUED IN THE TRIAL COURT 7

4. PETITIONER PLED PREEMPTION OF STATE LAW AND NOT OTHERWISE 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Billy Jack for Her, Inc., vs. New York Coat, Suit, Dress & Allied Workers Union, et al., 511 F. Supp. 1180 (U.S.D.C.S.D.N.Y. 1981) 6

Gutherie vs. Dow Chemical Co., 445 F. Supp. 311 (U.S.D.C.S.D.TX, 1978) 6

Kelly, Atty. Gen. vs. Carr, et al., 691 F.2d 800 (6th Cir., 1980) 6

Kidder v. Eastern Air Lines, 469 F. Supp. 1060 (U.S.D.C., S.D.Fla. 1978) 5

Lambert Run Coal Co. v. B. & O. Ry. Co., 258 U.S. 577, 42 S.Ct. 349, 66 L.Ed. 671 (1922) 6

McKinney v. M.K.T.Ry. Co., 357 U.S. 265, 2 L.Ed.2d 1305, 78 S.Ct. 1222 (1958) 5

Wamp v. Chattanooga Housing Authority, 527 F.2d 595 (6th Cir., 1975) 6

FEDERAL STATUTES

38 U.S.C. § 2021-2024 ..... 2, 4, 8

38 U.S.C. § 2022 ..... 2, 3, 5, 8

STATE STATUTES

TEX. STAT. ANN., art. 6243f § 7(c) 2, 3

TEX. STAT. ANN., art. 6252-4a 2, 3, 4, 7

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TO THE HONORABLE SUPREME COURT:

The Respondent, Firemen and Policemen's Pension Fund Board of Trustees of San Antonio, Texas, respectfully requests that this Court deny the Petition for a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

State Statute involved is Article 6243f, § 7(c), Vernon's Annotated Texas Statutes, which appears in Petitioner's Appendix on page 29a.

The Federal Statute involved is 38 U.S.C. § 2022 which appears in Petitioner's Appendix on page 37a.

Petitioner contends that Article 6252-4a, Vernon's Annotated Texas Statutes is involved. Petitioner as Plaintiff in the trial court did not plead this statute nor advert to it at any stage until the contention was made in his reply brief in the Texas Court of Appeals that such statute was tried by consent. This is not true. Article 6252a-4a appears in Petitioner's Appendix beginning at page 30a.

STATEMENT

There are errors and omissions in Petitioner's statement. The second paragraph thereof seeks to give the impression that Petitioner (as Plaintiff in the trial court) only pled the federal statute, 38 U.S.C. § 2021-2024, inclusive, by way of an anticipatory defense. The truth is that Petitioner in his trial pleading (which can be found in his appendix herein at pages 6a and 7a) alleged "that his rights are governed by Title 38, § 2021(a)(b) *et seq.* of the United States Code . . . " and, again, " . . . Plaintiff says that these federal statutes supersede any Texas statutes to the contrary pursuant to the Supremacy Clause of the United States Constitution, Article 1, § 8, Clause 12 which preempts states from enacting legislation limiting or restricting such congressional power. . . ." He then pled,

alternatively, that the federal law made the state law unconstitutional (Petitioner's Appendix 7a).

On page 4 of the Petition, it is pointed out that in its legal conclusions the Court found that Petitioner's suit had but tangential reference to federal law and that Article 6252-4a, Vernon's Annotated Texas Statutes afforded Petitioner a separate independent ground of recovery. What is not said is that the latter statute was not plead by Petitioner in the trial court. It was not pled until he filed his Appellee's Brief. No reference is made to the fact that the trial court's conclusions also included the following statements: "5. The Plaintiff's right to contribute funds for the four (4) years while on active duty with the United States Air Force is *controlled* and *governed* by the provisions of 38 U.S.C. 2021, *et seq.*" and "6. This congressional act evidences a uniform scheme to residents of all of the 50 states of the United States who may enter its armed forces, and consequently, these federal benefits override and supersede the provisions of § 7(c) of Article 6243f, V.A.C.S. under Article 6, Clause 2, the United States Constitution, more commonly known as the Supremacy Clause." (Emphasis added.)

Under Texas law a plea to the jurisdiction can be filed at any stage of the proceedings in any lawsuit where such a plea is relevant. This is elementary.

The last paragraph of Petitioner's statement is wholly erroneous in claiming that the enforcement provisions found in 38 U.S.C. 2022 "was pled only to dispel the defense which was actually asserted by the Respondent that Petitioner's volunteering for active duty deprived him of the right to contribute to the fund." As shown

above, the allegation was actually that the federal law preempted state law and that his case was governed by federal law, all asserted in affirmative terms and not by way of defense.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petition should be denied for the following reasons:

1. Petitioner's claim is wholly dependent on the provisions of 38 U.S.C. § 2021-2024, inclusive, under his pleadings and this federal statute confers exclusive jurisdiction on the United States District Courts.

2. The rule is well established by this Court that if a case is filed in state court as to which federal jurisdiction is exclusive it cannot be removed to federal court. It must be dismissed in state court and then be refiled by the Plaintiff in federal court.

3. The Texas statute granting veteran's benefits was not pled or even discussed or cited in the trial court. Petitioner as Plaintiff did not rely on same and Respondent as Defendant had no notice that it was involved nor any opportunity to defend and meet any issue arising out of such statute (Article 6252-4a, V.A.T.S.).

4. Petitioner (as Plaintiff) pled in the trial court that the federal law preempted state law on this subject and the trial court so concluded in its findings.

We will briefly discuss each of these points in turn.

1. FEDERAL COURT JURISDICTION IS EXCLUSIVE

Title 38 U.S.C. § 2022 "Enforcement Procedures" solely empowers the District Court of the United States to enforce these provisions and also provides that the veteran can require, without compensation, the services of the United States attorney to enforce his rights in such court. There is no ambiguity in this section.

In the case of *Kidder v. Eastern Air Lines,* 469 F. Supp. 1060 (U.S.D.C., S.D.Fla. 1978), the court held that " . . . the federal courts are the *exclusive forum* for the vindication of these distinctively federal rights (McKinney v. M.K.T.Ry. Co., supra, 357 U.S. at 268, 78 S.Ct. 1222)." (Emphasis supplied.) (At page 1065 of 469 F.Supp.)

This court in the case of *McKinney v. M.K.T.Ry. Co.,* supra, 357 U.S. 265, 2 L.Ed.2d 1305, 78 S.Ct. 1222 (1958), is authority both for the proposition that this cause of action arises under the laws of the United States and that the federal courts have exclusive jurisdiction. See pages 269-270 of 357 U.S. or page 1309 of 2 L.Ed.2d.

The U. S. Supreme Court (at this page) referred to the rights asserted here as "these distinctively federal rights" and pointed out that the District Court (meaning the United States District Court) "has jurisdiction."

The opinion goes on to say that "the statutory scheme contemplates the speedy vindication of the veteran's rights by a suit brought immediately in the District Court . . . "

Petitioner has never presented a single case to the contrary, state or federal, wherein state jurisdiction over such a case was exercised or upheld.

2. THIS CASE COULD NOT HAVE BEEN REMOVED TO FEDERAL COURT

Petitioner's point that it was up to Respondent to remove the case from the state court to the federal court if it wished to do so is completely without merit because if the federal court had exclusive jurisdiction, it could not be removed under the opinions of this court and if the state court had jurisdiction there was not ground for removal. In either event, Petitioner's point in this regard is absurd.

The leading case is *Lambert Run Coal Co. v. B. & O. Ry. Co.*, 258 U.S. 577, 42 S.Ct. 349, 66 L.Ed. 671 (1922). This court speaking through Mr. Justice Brandeis, said: "The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter or the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction."

See *Lambert Run Coal Co. v. B. & O. Ry. Co.*, 258 U.S. 577, 42 S.Ct. 349, 66 L.Ed. 671 (1922), supra; *Kelly, Atty. Gen. vs. Carr, et al.*, 691 F.2d 800 (6th Cir., 1980) at page 805; *Billy Jack for Her, Inc. vs. New York Coat, Suit, Dress & Allied Workers Union, et al.*, 511 F. Supp. 1180 (U.S.D.C.S.D.N.Y. 1981) at page 1188; *Gutherie vs. Dow Chemical Co.*, 445 F. Supp. 311 (U.S.D.C.S.D.TX, 1978); and *Wamp v. Chattanooga Housing Authority*, 527 F.2d 595 (6th Cir., 1975) at page 597.

3. ARTICLE 6252-4a WAS NOT PLED, CITED, DISCUSSED OR ARGUED IN THE TRIAL COURT

Petitioner's suit was one to enforce the federal veteran's act and the state act was not pled.

As stated above, Petitioner never did plead the state act, Article 6252-4a, V.A.T.S., and it was not cited or argued before the trial court nor did Respondent have any kind of notice that such statute was being relied on or invoked.

Petitioner's trial pleading, "Plaintiff's First Amended Original Petition," is to be found in Petitioner's Appendix beginning at page 3a through page 9a. It will be seen that Article 6252-4a is never pled or mentioned in said pleading. Respondent did not have an opportunity to prepare a response to this act or present a defense thereto. There was no trial by consent as to such statute because Respondent had no notice of it and was completely unaware that Petitioner was relying on same. It was injected into this case after the trial had been concluded.

4. PETITIONER PLED PREEMPTION OF STATE LAW BY THE FEDERAL STATUTE AND NOT OTHERWISE

Here again we refer the Court to Petitioner's trial pleading beginning at page 3a of his Appendix. Note paragraph VI at page 6a of the Appendix wherein the following is to be read: "Pleading further, Plaintiff says that these federal statutes supersede any Texas statutes to the contrary under the Supremacy Clause of the United States Constitution . . . " Petitioner stood four square on his Title 38 rights as shown by his pleading, Paragraph V on page 6a of his Appendix wherein he states "that his

rights are governed by Title 38 § 2021(a)(b) *et seq.* of the United States Code . . . "

The simple truth is that this case was brought in state court in order to recover attorney's fees under the Texas Declaratory Judgment Act. Petitioner, in effect, concedes this in the paragraph beginning at the bottom of page 10 of his petition. Title 38 U.S.C. § 2022 provided that Petitioner could have filed his claim in U. S. District Court (as the statute requires) through the United States attorney without any expense or cost.

CONCLUSION

In conclusion Respondent points out that it pled and argued in the courts below many points of defense in addition to its plea to the jurisdiction. Neither the Court of Appeals nor the Texas Supreme Court reached any of these well pled issues which were supported in the record, inasmuch as there was no jurisdiction.

We submit that the federal statute makes it plain that the assertion of these veteran's rights under Title 38 must be enforced in the U. S. District Court. The petition for Writ of Certiorari should be denied.

Respectfully submitted,

HARVEY L. HARDY, SB# 08986000
HARDY SCHWARTZMAN BAHAN
& JACOBSON, P.C.
400 GPM South Tower
800 N.W. Loop 410
San Antonio, Texas 78216
Phone: (512) 341-1333

Attorney for Respondent

Supreme Court, U.S.
FILED
OCT 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

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PETITIONER'S REPLY

MAYO J. GALINDO
7718 Broadway
San Antonio, Texas 78209
(512) 828-6777
State Bar No. 07580000
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF AUTHORITIES

Page

CASES

Bellefonte Underwriters Ins. Co. v. Brown, 663 S.W.2d 562 (Tex. App. – 14 Dist. 1983) *affirmed in part and reversed in part* at 704 S.W.2d 742 (Tex. 1986) 2, 3

Chicago R. I. & G. Ry. Co. v. DeBord, 192 S.W. 767, 769 (Tex. 1917) 2

Gins. v. Mauser Plumbing Supply Company, 148 F.2d 974 (CA 2d, 1945) 2

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8(a)(2) 2

Rule 54(c) 2

TREATISES

Wright & Miller, Federal Practice and Procedure, Section 1219 2

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PETITIONER'S REPLY

ROBERT W. LOTT replies to Respondent's Brief in Opposition to His Petition for Writ of Certiorari to the Supreme Court of Texas.

Respondent's answer is predicated largely on the theory that it was incumbent upon Petitioner to plead the specific statute which authorized relief. This concept is a vestige of common law pleading and has been rejected by both Federal and Texas courts.

Rule 8(a)(2), Federal Rules of Civil Procedure simply requires that the pleader allege "a short and plain statement of the claims showing that the pleader is entitled to relief . . . "

Rule 54(c) Federal Rules of Civil Procedure further provides "final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleading."

We believe this rule is tersely stated in *Gins v. Mauser Plumbing Supply Company*, 148 F.2d 974 (CA 2d, 1945):

> A simple statement in sequence of the events which have transpired, coupled with a direct claim by way of demand for judgment of what the plaintiff expects and hopes to recover, is a measure of clarity and safety; and even the demand for judgment loses its restrictive nature when the parties are at issue, for particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not.

See also the authorities in Section 1219, Wright & Miller, Federal Practice and Procedure, Syllabus 51, 52.

Texas follows the Federal Rule and does not require the specific pleading of a statute upon which relief can be granted. *Chicago R. I. & G. Ry. Co. v. DeBord*, 192 S.W. 767, 769 (Tex. 1917):

> It is not necessary to plead the law, but when the pleading is sufficient to admit the evidence, upon its introduction, the duty of the court arises to apply the law.

In *Bellefonte Underwriters Ins. Co. v. Brown*, 663 S.W.2d 562 (Tex. App. – 14 Dist. 1983), affirmed in part and

reversed in part at 704 S.W.2d 742 (Tex. 1986), the court stated:

> Texas law unquestionably holds that a plaintiff need only plead facts which, if true, entitle him to the relief sought. Texas does not require a plaintiff to specifically plead case authority or statutes to receive that relief. See Colbert v. Dallas Joint Stock Land Bank, 129 Tex. 235, 102 S.W.2d 1031, 1033 (1937).
>
> Moreover, pleading an incorrect or inapplicable theory or statute, as was done here, does not preclude an award. *National Bank v. Texas Investment Co.*, 74 Tex. 421, 12 S.W. 101, 103 (1889).

In the case at bar the trial court specifically found that Article 6252-4a of the Texas Statutes affords Petitioner a separate, independent ground of recovery and this was sufficient under Texas law.

The judgment of the Texas appellate courts that Petitioner's suit was one to enforce the provisions of federal law is dispelled by the Petitioner's Amended Petition, Federal and Texas substantive law.

We pray as in our original application for certiorari.

Respectfully submitted,

MAYO J. GALINDO
7718 Broadway
San Antonio, Texas 78209
(512) 828-6777
State Bar No. 07580000

Attorney for Petitioner